SAMAWORLD ASIA SDN BHD & ANOR A

v.

RHB BANK BHD

COURT OF APPEAL, PUTRAJAYA B
MOHD GHAZALI YUSOFF JCA
VINCENT NG JCA
KN SEGARA JCA
[CIVIL APPEAL NO: W-02-155-2005]
21 JANUARY 2008 C

CONTRACT: *Collateral contracts - Whether collateral contract existing - Claim by bank for outstanding sums owed - Whether there was an oral collateral contract rendering repayment unnecessary - Finding of fact - Judicial appreciation of evidence - Balance of probabilities* D

CIVIL PROCEDURE: *Appeal - Finding of fact by trial judge - Whether clearly wrong and could not be justified on evidence - Existence of collateral contract - Judicial appreciation of evidence - Balance of probabilities* E

The plaintiff bank claimed against the 1st and 2nd defendants (the 2nd defendant was guarantor for the 1st defendant) for payment of outstanding sums owed by the 1st defendant to the plaintiff. The defendants' defence was that there was an oral collateral contract between the plaintiff and the 1st defendant rendering F them not liable to repay the sums claimed by the plaintiff, because proceeds from the sale of some 10 million shares in the first defendant charged to one Rakyat Merchant Bankers Bhd ('RMBB') should be the sole method of repayment of a RM3 million short-term loan facility granted by RMBB to the 1st G defendant. The main issue before the trial judge was whether there was an oral contract as alleged by the defendants, which was a question of fact. He found that the defendants had failed to prove the existence and the terms of the alleged oral contract. Hence, the present appeal by the defendants in which their main ground H of appeal was the trial judge failed to properly evaluate all the oral evidence before him, preferring instead to rely purely on documents and to draw inferences therefrom.

I

Held (dismissing the appeal)
Per KN Segara JCA delivering the judgment of the court:

(1) Collateral contracts must be proved strictly, and the terms of such contracts and the existence of a contrary intention on the part of all parties must be proved strictly. Whether there was indeed a collateral contract, as alleged by the defendants, was a finding of fact by the trial court. An appellate court will not overturn the trial court's findings unless it is entirely satisfied that the findings are clearly wrong and could not be justified on the evidence. In this instance, the trial judge's findings that the collateral agreement and terms as claimed by the defendants had not been proved should not be disturbed. His approach to the issue on the collateral contract was correct in law and in fact. He had judicially appreciated all the evidence placed before him and had analysed the oral evidence as against the indisputable documentary evidence. Thereafter, after carefully considering the oral testimonies of the witnesses as well as the documentary evidence before him, he concluded that the defendants had failed to prove on a balance of probabilities the existence of an oral collateral contract that the sole source of repayment of the loan facility was from the sale of the charged shares, and that the defence on this ground must fail. In the upshot, the defendants' appeal was without merits. (paras 23, 26, 27, 28, 29 & 30)

Bahasa Malaysia *Translation Of Headnotes*

Plaintif bank memohon terhadap defendan pertama dan kedua (defendan kedua merupakan penggerenti bagi defendan pertama) untuk pembayaran balik hutang yang belum dijelaskan oleh defendan pertama kepada plaintif. Pembelaan defendan-defendan ialah terdapat sesuatu kontrak kolateral lisan di antara plaintif dan defendan pertama yang menyebabkan mereka tidak perlu membayar balik hutang yang dituntut oleh plaintif, sebab hasil jualan beberapa 10 juta syer di dalam defendan pertama yang dicaj kepada satu Rakyat Merchant Bankers Bhd ('RMBB') sepatutnya cara tunggal bagi pembayaran balik sesuatu kemudahan pinjaman jangkamasa pendek yang diberi oleh RMBB kepada defendan pertama. Isu utama di hadapan hakim perbicaraan ialah sama ada terdapat kontrak lisan seperti yang dikatakan oleh defendan-defendan, yang merupakan sesuatu dapatan berdasarkan fakta. Beliau memutuskan bahawa defendan-defendan gagal membuktikan kewujudan dan terma-terma kontrak lisan yang dikatakan. Oleh itu, rayuan ini

dibuat oleh defendan-defendan di mana alasan utama rayuan ialah bahawa hakim perbicaraan gagal mempertimbangkan dengan betul semua keterangan lisan yang dikemukakan dihadapannya, dan sebaliknya memilih untuk bergantung semata-mata ke atas dokumen-dokumen dan membuat inferens darinya.

Diputuskan (menolak rayuan)
Oleh KN Segara HMR menyampaikan penghakiman mahkamah:

(1) Kontrak kolateral mesti dibuktikan dengan jelas, dan terma-terma kontrak sebegitu dan kewujudan keinginan berlainan pada semua pihak mesti dibuktikan dengan jelas. Sama ada terdapat kontrak kolateral, seperti yang dikatakan oleh defendan-defendan, adalah satu dapatan berdasarkan fakta oleh mahkamah perbicaraan. Sebuah mahkamah rayuan tidak akan menolak dapatan mahkamah perbicaraan kecuali ia betul-betul puas bahawa dapatan tersebut jelas salah dan tidak dijustifikasi berdasarkan keterangan. Di dalam kes terkini, dapatan hakim perbicaraan bahawa kontrak kolateral dan terma-terma seperti yang dituntut oleh defendan-defendan tidak terbukti tidak harus dicampurtangan dengan. Pendekatan beliau terhadap isu kontrak kolateral tersebut adalah betul dari segi undang-undang dan fakta. Beliau meneliti secara kehakiman semua keterangan yang ada dan telah membuat analisis keterangan lisan berbanding dengan keterangan dokumentari yang tidak dipertikaikan. Setelah itu, selepas mempertimbangkan dengan cermat keterangan lisan saksi-saksi dan juga keterangan dokumentari yang ada, beliau memutuskan bahawa defendan-defendan gagal membuktikan atas imbangan kebarangkalian kewujudan kontrak kolateral lisan yang mengatakan punca tunggal pembayaran balik kemudahan pinjaman tersebut ialah dari jualan syer yang dicaj, dan bahawa pembelaan berdasarkan alasan ini mesti gagal. Kesudahannya, rayuan defendan-defendan tidak mempunyai merit.

Case(s) referred to:
Gek Lau Choon Theatrical Company v. Hu Kiang Yan [1937] MLJ Rep 23 ***(refd)***
Watt v. Thomas [1947] AC 484 ***(refd)***

Legislation referred to:
Evidence Act 1950, s. 92

A *For the appellant - Mark Lau; M/s Sivananthan*
For the respondent - Adrian Hii (CY Keong with him); M/s Shook Lin & Bok

[Appeal from High Court, Kuala Lumpur; Civil Suit No: D4-22-745-96]

B *Reported by Suresh Nathan*

JUDGMENT

C **KN Segara JCA:**

[1] This is an appeal against the decision of the learned Judge High Court at Kuala Lumpur given on 26 January 2005 after a full trial.

D **[2]** The 1st appellant is SamaWorld Asia Sdn Bhd (hereinafter referred to as the 1st defendant). The 2nd appellant is Lim Kut Sheong @ Lim Tuck Fatt (hereinafter referred to as the 2nd defendant). The respondent is RHB Bank Berhad, previously known as DCB Berhad (hereinafter referred to as the plaintiff).

E **[3]** The plaintiff bank claimed against the 1st and 2nd defendants:

(a) the sum of RM3,645,154.48;

F (b) interest on the principal of RM3,000,000 at the rate of 2.0% per annum above the plaintiff's costs of funds calculated on a daily basis from 1 October 1996 to the date of full payment;

G (c) additional default interest on the outstanding interest charged on the sum of RM3,000,000 at the rate of 3.0% per annum over and above the plaintiff's costs of funds calculated on a daily basis with monthly rests from 1 October 1996 to date of full payment.

H **[4]** The 1st defendant was at all material times a customer of Rakyat Merchant Bankers Berhad (RMBB). On or about 4 November 1992 RMBB granted a RM3.0 million short term loan facility to the 1st defendant. Pursuant to the granting of the said
I loan facility the 1st defendant executed a Short Term Loan Facility Agreement with RMBB on or about 12 November 1992. By a memorandum of deposit of shares, dated 12 November 1992, the

1st defendant deposited and charged by way of a first fixed charge 10.0 million shares of SamaWorld (Malaysia) Sdn Bhd in favour of RMBB to secure the repayment by the 1st defendant to RMBB, on demand, of the debt outstanding under the said loan facility, together with other charges arising out of or incidental to the taking or realization of the said security for the said loan facility.

[5] The 2nd defendant was a director of the 1st defendant. By a written and continuing guarantee dated 12 November 1992 executed between the 2nd defendant, the 1st defendant and RMBB, the 2nd defendant unconditionally and irrevocably guaranteed the repayment by the 1st defendant of the whole of the said loan together with interest thereon and all costs charges and all other sums payable by the 1st defendant under the provisions of the said loan agreement.

[6] The 1st defendant agreed, *inter alia*, under section 6.1 of the said loan agreement, to repay to RMBB the amount of the principal and the prescribed interest thereon by one lump sum on or before the expiry of the three months from the date of the first drawdown of the said loan facility.

[7] The said loan facility was, pursuant to a written notice of drawdown, released on 16 November 1992 and became due for full settlement on 16 February 1993. On or about 13 June 1994 RMBB granted an extension of time for the repayment of the said loan facility up to 31 May 1995.

[8] Pursuant to the Banking and Financial Institutions Act 1989 and by order of court dated 7 November 1996 all interests, assets, rights remedies and liabilities of RMBB (previously vested into BSN Merchant Bank Berhad *vide* the order dated 22 July 1995) were further vested and transferred to the plaintiff as of 1 October 1996. It was also ordered that any accounts, agreements, contracts or instruments to which RMBB was a party shall have effect as from 1 October 1996 as if the plaintiff has been a party thereof instead of RMBB. As at 30 September 1996, the 1st defendant remained indebted to BSN Merchant Bank Berhad in the sum of RM3,645,154.48 *vide* the said short term loan facility originally granted by RMBB.

[9] BSN Merchant Bank Berhad had on 22 August 1996 issued a letter, through its solicitors, to the 1st defendant demanding payment of the sum of RM3,576,277.83 being the outstanding

amount due and payable as at 31 July 1996, together with interest thereon, but the 1st defendant failed to make payment thereof.

[10] Pursuant to the provisions of section 14.1 of the said loan agreement, the plaintiff, through its solicitors, by letter dated 10 October 1996 terminated the said loan facility, and declared all outstanding sums owing under the said agreement due and payable, immediately.

[11] On 15 October 1996, the plaintiff, through its solicitors, issued a letter of demand to the 2nd defendant demanding payment of RM3,576,277.83, being the outstanding balance owing by the 1st defendant as at 31 July 1996, and interest thereon. However, the 1st and 2nd defendants failed to repay the sums claimed by the plaintiff.

[12] The defence, in a nutshell, is that there is an oral collateral agreement rendering the defendants not liable to repay the sums claimed by the plaintiff, because the proceeds from the sale of the 10 million shares in SamaWorld Malaysia charged to RMBB shall be the sole method of repayment of the short term loan facility. It was pleaded in the defence that there was a collateral contract to the short term loan facility agreement dated 12 November 1992 and the memorandum of deposit of shares dated 12 December 1992 between the plaintiff and the 1st defendant.

[13] RMBB had made numerous efforts to sell the shares but could not find any buyer. We pause at this juncture to observe that, irrespective of the existence of such a collateral contract, the defendants surely cannot hope to escape from liability for repayment of the loan if the shares could not be sold! There can be no commercial practice or custom that would impute such a favorable term in favour of a borrower for the repayment of such a large loan in a written contract, let alone an alleged oral collateral contract. It is to be further observed that the said shares are not of a public listed company and cannot be readily sold in the open market.

[14] By a letter dated 15 August 1992 (record of appeal, p. 488) the 1st defendant had given to RMBB as a merchant bank, a mandate to help sell 20-30 million shares in the 1st defendant's subsidiary, SamaWorld Malaysia Sdn Bhd, owned by the 1st defendant. The mandate was non exclusive and the 1st defendant agreed to pay 2% commission to RMBB.

[15] The letter of offer for the RM3.0 million short term loan dated 4 November 1992 (record of appeal, p. 493) and the short term loan facility agreement dated 12 November 1992 (record of appeal, p. 417) discloses the following:

(a) The purpose of the facility is a bridging loan for the funding of the project in Genting Highlands (called SamaWorld Theme Park) of the 1st defendant's subsidiary SamaWorld Malaysia, before receipt of the proceeds of sale of the 1st defendant's shares in SamaWorld Malaysia to investors.

(b) The loan shall be repaid within three months from the drawdown.

(c) The 1st defendant shall execute a memorandum of deposit of shares whereby the 1st defendant charges 10 million of its shares in SamaWorld Malaysia to RMBB.

[16] On 12 November 1992 the 1st defendant did execute the said memorandum of deposit of shares (record of appeal p. 466). The memorandum of deposit of shares is over only a portion of the 20-30 million shares that the 1st defendant had earlier mandated RMBB to sell *vide* letter dated 15 August 1992.

[17] The defendants allege that there was an oral collateral contract containing the following terms:

(1) The loan shall be utilized to settle the debt owed by a related company of the 1st defendant known as SamaWorld Corporation Sdn Bhd to RMBB under a separate facility granted to the said SamaWorld Corporation Sdn Bhd.

(2) The proceeds from the sale of the 10 million shares in SamaWorld Malaysia charged to RMBB shall be the sole method of repayment of the loan facility.

[18] The defendants also allege that the loan sum of RM3 million was paid to Hwang DBS Securities Sdn Bhd at the instructions of Zarul Ahmad Zulkifli, RMBB's former company secretary and Head of Corporate Affairs, and there is a total failure of consideration as they do not know what happened to the money. The defendants counterclaimed against the plaintiff on the alleged oral collateral contract.

[19] The existence of the alleged oral collateral contract by the defendants whereby the plaintiff is to look solely to the proceeds from the intended sale of shares in SamaWorld Malaysia for repayment of the loan is diametrically contrary to and in complete disregard of the express terms of:

i) the short term facility agreement dated 12 November 1992,

ii) the guarantee (by the 2nd defendant) dated 12 November 1992, and

iii) the memorandum of deposit of shares dated 12 November 1992, which were all standard loan documents that set out the liability of the 1st defendant and 2nd defendant as borrower and guarantor, respectively, for the RM3 million loan.

[20] It is incredible that the plaintiff will have no recourse to the defendants for repayment of the loan even if the plaintiff could find no buyer for the shares in SamaWorld Malaysia and the shares are practically worthless!!

[21] The main issue before the trial judge was whether there was the oral collateral contract as alleged by the defendants, which is a question of fact. The learned trial judge found, at the conclusion of the trial, that the defendants had failed to prove on a balance of probabilities the existence and the terms of the alleged oral collateral contract.

[22] The defendants main ground of appeal before us is that the learned trial judge failed to properly evaluate all the oral evidence before him, preferring instead to rely purely on documents and to draw inferences therefrom. The defendants allege that the learned trial judge failed to properly test or examine the documents critically against the oral evidence in deciding there was no collateral contract.

[23] The law views with suspicion collateral contracts, the sole effect of which is to vary or add to the terms of the principal contract. Collateral contracts must be proved strictly. The terms of such contracts and the existence of a contrary intention on the part of all the parties must be clearly shown.

[24] The parol evidence rule in s. 92 of the Evidence Act 1950 provides that no evidence of any oral agreement shall be admitted for the purpose of contradicting any terms of a written agreement. Nevertheless, under proviso (b) thereof:

> the existence of any separate oral agreement, as to any matter on which a document is silent and which is not inconsistent with its terms, may be proved, and in considering whether or not this proviso applies, **the court shall have regard to the degree of formality of the document.** (emphasis added)

[25] In *Gek Lau Choon Theatrical Company v. HuKiang Yan* [1937] MLJ Rep 23 at 24 Mc Elwaine, CJ observed "… the more formal the written document is, the more suspicious the Court must be as to the existence of a collateral contract, and if the contract is informal less suspicion attaches to the attempt to set up a collateral contract." With respect, we endorse and accept the said observation of Mc Elwaine, CJ and unhesitatingly adopt it as a principle applicable to the present appeal, a *fortiori* the evidence adduced before the trial court. The Court must be circumspect and view with suspicion the defendants' attempt to set up the oral collateral contract, contrary to the formal loan documents executed with RMBB.

[26] Whether there was indeed a collateral contract, as alleged by the defendants, is a finding of fact by the trial court. The principles on appellate interference with findings of fact by the trial court are trite and well established. An appellate court will not overturn the trial court's findings unless it is entirely satisfied that the findings are clearly wrong and could not possibly be justified on the evidence. In *Watt v. Thomas* [1947] AC 484 Viscount Simon in the House of Lords stated as follows:

> Apart from the classes of case in which the powers of the Court of Appeal are limited to deciding a question of law … an appellate court has, of course, jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached upon that evidence should stand; but this jurisdiction has to be exercised with caution. If there is no evidence to support a particular conclusion (and this is really a question of law), the appellate court will not hesitate so to decide. *But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at the trial, and especially if that conclusion has been arrived at on conflicting testimony* by a tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial judge as to where credibility lies is entitled to great weight. (emphasis added)

[27] We are unanimous that the learned trial judge's findings, that the collateral agreement and terms as claimed by the defendants have not been proved, should not be disturbed. His approach to the issue on the collateral contract was correct in law and in fact. We are satisfied that he had judicially appreciated all the evidence placed before him and had analysed the oral evidence as against the indisputable documentary evidence. He set out in his grounds, *inter alia*:

> It must be observed firstly that since the fact of an oral contract is a fact asserted by the Defendants, and is disputed by the other party, and the defence, the onus is upon the Defendants to prove upon a balance of probabilities the existence and the terms of the oral contract, in particular, that the sale from the proceeds of the 10 million shares in SamaWorld Malaysia charged to RMBB under the Memorandum of Deposit shall be the sole method of repayment of the facility.

[28] Thereafter, after carefully considering the oral testimony of the witnesses as well as the documentary evidence before him, he concluded:

> It is evident that the Defendants have failed to prove on a balance of probabilities the existence of an oral collateral contract that the sole source of repayment of the facility is from the sale of the charged shares, and the defence on this ground must fail.

[29] The learned trial judge further found:

> Although it was averred by the 2nd defendant that he had only agreed to guarantee up to a limit of RM1,000,000.00 and not RM3,000,000.00 there is no evidence advanced and no submissions made on this point. The Court therefore considers the alternative averment in paragraph 12 of the 2nd Defendant's defence as abandoned.

[30] In the upshot, we are unanimous that the 1st defendant's and the 2nd defendant's appeal is without merits. The appeal is dismissed with costs. The decision of the trial judge is affirmed.

[31] Deposit of this appeal to respondent on account of taxed costs.